In the

# United States Circuit Court of Appeals

For the Ninth Circuit

No. 6436

UNITED STATES OF AMERICA,
Appellant

v.

JENNIE BLACKBURN, as Administratix of the Estate of John R. Blackburn,
Appellee.

*Upon Appeal From the United States District Court for the Western District of Washington, Northern Division*

## Brief of Appellee, Jennie Blackburn, Etc.



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### STATEMENT OF THE CASE

As stated in the Appellant's brief, this is the second appeal in this case upon re-trial after reversal by this Court, the opinion being reported in 33 Fed. (2d) 564.

John R. Blackburn, deceased, enlisted in the United States Army on the 30th day of March, 1917, and applied for a policy of war risk term insurance as soon as the same became available, on or about the 16th day of November, 1917, and the premiums thereon were paid up to and including the month of September, 1919, on the 25th day of which month the defendant was discharged, and on the 10th day of December, 1925, the insured died from pulmonary tuberculosis. Thereafter a claim was filed for his insurance with the United States Veterans Bureau, upon the denial of which this suit was instituted (R. 1-3). These facts are admitted by the defendant in its answer (R. 3-6), and the only question raised by the pleadings is whether or not the plaintiff was totally and permanently disabled from following continuously a substantially gainful occupation from the date of discharge, in accordance with the allegations of the plaintiff's complaint (R. 2). The jury found upon the evidence that the deceased was so disabled from and after September 25th, 1919, the date the deceased was discharged from the Army, and in accordance therewith, returned a verdict for the plaintiff (R. 8), upon which judgment was entered (R. 8), and the several assignments of error relied upon raised but two questions. First, the sufficiency of the

evidence to sustain the verdict, and, second, the admissibility of plaintiff's Exhibits 1, 2 and 3, over the objection of the defendant, which Exhibits are reports made by Government doctors upon examination of the deceased at times prior to his death. These questions will be argued separately.

## I.

First question raised by the defendant in its brief is the question of the sufficiency of the evidence. In arguing this point, reference must necessarily be made to the evidence as contained in the record (R. 21-39).

The witness Frank Renchey testified in substance that he had known the deceased since his birth and that at the time he, the decased, went into the service, he was a "good, rugged boy" (R. 22). And that after his return from the service the deceased had "a slight cough all the time and his complexion was sallow and very yellow" (R. 23). Also the witness testified concerning the deceased's few attempts to work, that while the deceased was working he would get sick at his stomach, sometimes several times a day, during which time he would have to leave his work and be gone for fifteen or twenty minutes (R. 22).

This testimony was followed by that of the witness R. C. Polley, for whom the deceased worked during the months of April, May, June and July of 1921, during which time he worked but about half the time. During the time the deceased worked for this witness, he would have sick spells, at which time the witness would send him home. He would have "spells of coughing and would have to sit down or lie down" (R. 24). Also, "he would vomit if he would lift anything at all times of the day" (R. 24).

The witness Roy B. Misener, whose testimony is contained on pages 26 and 27 of the Record, knew the deceased and was a friend of his prior to the war, and saw the deceased in bed the first or second day after his return from France, when the witness went to visit the deceased. This witness also visited the deceased several times and "usually found him in bed most of the time" (R. 27).

The other lay witness, and probably most reliable witness, was the plaintiff herself, who is the mother of the deceased, and from her testimony, contained on page 28 of the Record, we find the deceased spent several winters prior to his death in Government hospitals. We also find that shortly after his discharge and prior to his confinement in the hospitals he at-

tempted to do some work; that during the time he attempted to work "he would not be able to eat when he came home at night" (R. 28). And "he would have a coughing spell, and vomit, and then go to bed" (R. 28). It is also evident from the testimony of this witness that prior to his attempting to work he tried to do chores around the house, and "after he did chores he would get sick and tired. He was worn out." (R. 28.)

We fiind that the work which the deceased did, beside that heretofore mentioned, during the Spring of 1921, was work in a shingle mill for a month or so commencing January, 1920. This is the statement of the witness C. E. Wilson, for the defendant (R. 33-34). And during the time he worked for Wilson "He complained that he did not feel well" (R. 34).

Doctor Elmer E. Lytle, who testified on behalf of the plaintiff, found the deecased suffering from an advanced stage of tuberculosis in May of 1925, which tuberculosis had continued over "a rather long period of time" (R. 29). The Doctor's testimony is substantiated by plaintiff's Exhibits 1, 2 and 3, which are reports of examinations made by the Government doctors at different times during the confinement of the deceased in the various hospitals where he spent practicaly the entire four years prior to his death.

This evidence is ample to support the finding of the jury that the deceased was totally and permanently disabled from following continuously any substantially gainful occupation from the date of his discharge. It will be borne in mind that during the six years between the date of discharge and the date of death the deceased spent four of those years in Government hospitals and all but approximately six months of the remaining two years at home, and confined a large portion of this time to his bed. His efforts at work, while honest, were notoriously unsuccessful, working but about a month in the early Spring of 1920 and about four months in the late Spring of 1921 . . . actually working but half of this time.

Attention is called to the opinion of the late Judge Rudkin in the former appeal of this case, 33 Fed. (2d) 564, wherein he said:

> "While the testimony was *ample* to prove temporary total disability, no witness, professional or lay, testified as to the nature of the illness from which the deceased was suffering, or as to the cause of his disability."

It is submitted that the use of the word "temporary" in the foregoing quotation was inadvertently used in view of the fact that the insured is long since

deceased. And it is also submitted that the testimony of Doctor Lytle and the plaintiff's Exhibits 1, 2 and 3 are ample to show the nature of the disability from which the deceased was suffering. It must also be borne in mind that the reversal of the previous appeal was based upon the erroneous admission of a death certificate showing tuberculosis as the cause of death.

This case seems to come clearly within the doctrine announced by this Court in the case of *LaMarche v. United States* 28 Fed. (2d) 828, in which this Court said:

> "But the burden was only on the plaintiff to prove permanent disability, and that such disability arose during the life of the policy. Mere inability on his part to prove the exact time and place of the injury to the hip was not fatal to his case if the jury was warranted in finding from the testimony that the injury and the accompanying disability occurred and existed during the life of the policy and we think the testimony was sufficient to warrant such a finding. After August 4th 1919, the plaintiff in error was confined to hospitals for nearly a year and a half, and there is ample warrant for finding total permanent disability from and after that date. We think also the testimony would warrant a finding of total permanent disability at a much earlier date and while the policy was in effect. His condition and symptoms after August 4th, 1919, did not differ materially from his conditions and symptoms prior to that date, and if conditions

> existing on and after August 4th are attributable to the injury to the hip might not the jury well find that similar conditions existing prior to that date arose from the same cause?"

As in that case, so in this, the same symptoms existed immediately after discharge as existed subsequent thereto, and the plaintiff had attempted to work and failed, and in this case as in that, the jury was warranted in finding the deceased totally and permanently disabled from and after the date of his discharge.

Total and permanent disability is the loss upon which this policy is payable, and upon a fair showing that the deceased was unable to work continuously from the time of his discharge, he is entitled to recover, regardless of the fact that there is no medical evidence other than that contained in plaintiff's Exhibits 1, 2 and 3, prior to 1925. It is unquestioned that the cause of death was tuberculosis, and it is apparent from these exhibits that the deceased was suffering from tuberculosis in 1921, and, as said by this Court in the case of *Mulivrana v. United States*, 41 Fed. (2) 734.

> "The nature of the malady from which the appellant was suffering (tuberculosis) makes it reasonably certain that the condition found upon the examination in 1921 had existed for some period prior thereto * * *."

The attention of this Court is also called to the case of *United States v. Godfrey*, 47 Fed. (2d) 126, wherein the claimant was first diagnosed as tubercular in 1925, prior to which time the plaintiff testified as to his inability to work and to his cough, and though it appears that the plaintiff did work practically from the time of his discharge until 1927, the Circuit Court sustained the verdict and, quoting the trial judge, said:

> "It sems * * * that the evidence before the jury tended to show that the plaintiff had active tuberculosis from the time of his discharge from the Army * * *.
>
> "A man with active pulmonary tuberculosis requires absolutely rest treatment, and may very properly be considered permanently and totally disabled unless his disease is arrested, which never occurred in the instant case."

The foregoing case was followed by this Court in the recent decision in *United States v. Lawson*, 50 Fed. (2d) 646. In the case at bar we are not, however, confronted with any long period of work . . . as in the *Lawson* and *Godfrey* cases, but, rather, the record herein is replete with evidence of the deceased's inability to work.

The cases are numerous which lay down the principle that lay evidence is sufficient to sustain a verdict for the plaintiff even where medical evidence is

contrary and the reason therefore seems to be well stated by the Circuit Court of Appeals for the Tenth Circuit in the case of *Barksdale v. United States*, 46 Fed. (2d) 762, wherein the Court said:

> "Medical men indulge very generally in theorizing on the affairs of life, while the living of life is a very practical affair."

Other cases to the same effect are:

*Malavski v. United States*, 43 Fed. (2d) 974;

*Vance v. United States*, 43 Fed. (2d) 975;

*United States v. Phillips*, 44 Fed. (2d) 689;

*Sprencel v. United States*, 47 Fed. (2d) 501.

In the last case the lay evidence of inability to work from date of discharge was substantiated only by medical examination as late as 1926. See also the late case of *United States v. Tyrakowski*, 50 Fed. (2d) 766.

It seems unnecessary to quote to this Court the numerous interpretations of total and permanent disability, such interpretations being now well settled by law, and it is submitted that the evidence in this case is much stronger than that contained in several of the cases cited, and as was said by the late Judge Rudkin in the last appeal of this case, "The testimony was ample to prove * * * total disability," the permanency of which was demonstrated by death.

## II.

Passing to the second question raised by the Appellant, namely the admissibility of Government records and examinations by Government doctors, the Court's attention is directed to the objection made by counsel for the defendant, which objection was directed to the whole of the Exhibits, and admitting for the purpose of this argument only that the documents do contain self-serving declarations which would ordinarily be inadmissible, still, the objection being general and directed to the whole Exhibits, was insufficient, and the trial court must necessarily have admitted the Exhibits. See *United States v. Stamey, et al*, 48 Fed. (2d) 150.

The defendant's brief on this point seems to raise the question of admissibility upon three grounds. First, that the reports contain statements which are self-serving declarations; second, that the defendant was deprived of its right of cross-examination; and, third, that the Exhibits were not properly identified.

It would seem that the question of admissibility of these reports has been decided by this Court in the case of *United States v. Stamey, et al, supra*, and by the Tenth Circuit Court of Appeals in the case of *Runkle v. United States*, 45 Fed. (2d) 804, and in the Fourth Circuit by the case of *United States v.*

*Cole*, 45 Fed. (2d) 339. Also this Court concurred in the admission of such documents by its affirmance in the case of *McGovern v. United States*, 294 Fed. 108, affirmed 299 Fed. 302. See also *Nichols v. United States*, 48 Fed. (2d) 203.

It must be borne in mind that the statements complained of in these Exhibits were obtained by the defendant under authority conferred upon the Veterans Bureau by Congress, vesting the Bureau with statutory authority to examine, report, determine and act under the War Risk Insurance Act, and such records being required by law to be kept, are public documents, and for that reason are competent evidence in actions on war risk insurance policies. See *McGovern v. United States, supra.* Also, in view of the fact that these statements were obtained and were given for the purpose of treatment, the same should be admissible in evidence under the rule permitting a physician to testify as to the subjective ailment and history of a patient obtained by said physician during the course of examination for purposes of treatment, which are presumed to be true by reason of the fact that the statements are made for the purpose of treatment, and are excepted from the hearsay rule.

The objection that the defendant is deprived of its right of cross-examination is without avail under the

decisions heretofore quoted. Consequently it seems unnecessary to discuss that phase in this brief.

Likewise the third objection, that there was no proper identification, is without merit. First, because the records were identified by the witness Christie, who testified that they were part of the regular record of the United States Veterans Bureau (R. 25); and, secondly, because the objection was not based upon failure to identify the record, and it is a well settled rule of law that an objection cannot be raised for the first time upon appeal, nor can the Appellant change the ground of his objection upon appeal.

The United States Circuit Court of Appeals for the Seventh Circuit recognized the admissibility of doctors' records such as these, which are a part of the Bureau files, *in toto*, by its constant reference to the subjective symptoms contained upon such record, which were introduced in evidence in the case of *United States v. Tyrakowski, supra.*

It is respectfully submitted that the appeal herein is without merit and that the judgment of the trial court should be affirmed.

Respectfully submitted,

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